United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original Affidavit of Mailing

74-1191

To be argued by
FRANCIS J. SHEERIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1191

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN BROWN,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Appellant John Brown appeals from a judgment of conviction entered February 8, 1974, after a jury trial, in the United States District Court, Eastern District of New York (Dooling, *J.*) convicting the appellant of the possession of an unregistered firearm, to wit: a sawed-off shotgun, in violation of Title 26, United States Code, Section 5861(d). Appellant was sentenced to five years imprisonment—six months in prison and probation for five years.

Appellant chose to proceed *pro se* during his trial but was represented by counsel during the hearing on his motion to controvert the search warrant. At trial counsel was assigned to assist appellant in his defense.

The sole issue on this appeal is whether the affidavit offered in support of the application for a search warrant

established probable cause for the issuance of the warrant. Appellant argues that it did not and accordingly challenges the admission into evidence of the shotgun seized at the time of the execution of the warrant.

Statement of Facts

The Suppression Hearing

On August 30, 1973, a hearing was held before the Honorable Orrin G. Judd on appellant's motion to suppress. Police Officer William Cannon, Jr., a seven year veteran of the New York City Police Department, testified that he was assigned to the Brooklyn-South Narcotics Division in January 1973 (H. 7).* Officer Cannon explained that following this assignment, he contacted anti-crime units operating in the area to gather intelligence about narcotics traffic in general and, specifically, about the identity of local addicts and other persons arrested for narcotics violations (H. 27).

Almost immediately, Officer Cannon began investigating the activities of appellant John Brown (H. 8). On the evenings of February 1 and 2, 1973, Cannon initiated surveillance of Brown's ground floor apartment located at 560 Osborn Avenue, Brooklyn, New York (H. 14, 34). Cannon positioned himself in the front seat of a parked automobile so that he could see the door of Brown's apartment at the end of a lighted hallway. Cannon was aided by his use of a pair of 7 x 50 binoculars equipped with 40 milimeter light-absorbing lenses (H. 15, 19-20, 36).

On February 1, 1973, Cannon observed two men enter 560 Osborn Avenue at approximately 10:45 P.M. One of the men remained in the hallway while the other entered

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* Page references preceded by "H" refer to the transcript of the suppression hearing.

Brown's apartment. Approximately three minutes later, this man exited Brown's apartment, rejoined his companion in the hallway and the two men then left the building (H. 25). A short time later, Cannon observed a lone female enter Brown's apartment. Cannon recognized this woman as a previously arrested drug addict. Like the two men who had just preceded her, this woman remained in Brown's apartment for about three minutes (H. 26-27).

Police Officer Cannon continued his surveillance. Approximately one hour later, a man, later identified as Jerry Johnson, was observed entering Brown's apartment. Predictably, Johnson left shortly thereafter. As he was leaving, Johnson was arrested and an immediate search of his person revealed three "nickel" ($5) bags of heroin. Johnson, an addict who had been previously arrested for narcotics violations, was immediately advised of his *Miranda* rights. Johnson then admitted that he had just purchased the heroin from appellant John Brown at 560 Osborne Avenue. Johnson further related that while in Brown's apartment, Brown showed him a .38 calibre revolver and a sawed-off shotgun (H. 28-34).

On the following evening, February 2, 1973, Police Officer Cannon once again observed the same female addict he recognized the night before. Her routine was identical. She entered Brown's apartment, remained for approximately three minutes, and then left (H. 26).

On February 6, 1973, Police Officer Cannon applied for a search warrant for Brown's apartment at 560 Osborne Avenue, Brooklyn, New York. Cannon drafted his own affidavit and presented it to Judge Nicholas Coffinas of the New York City Criminal Court. Cannon's affidavit reads as follows:

> Ptl. William M. Cannon, Jr., Sh# 24996 Narc. Dist. #12 O.C.C.B. being duly sworn, deposes and says:

1. I am a police officer assigned to narcotics district #12 O.C.C.B.

2. I have information based upon Information and investigation of Organized Crime Control Bureau Complaint #3-884. Investigation and personal observation of the above mentioned Patrolman reveals the following: On Feb. 1, 1973 during the hours of 2245 to 2335 observed two males enter 560 Osborn Ave and go to the ground floor rear apt. remain there for a period of (3) three minutes and then exit. Then one female enter remain (3) three minutes and then exit. At 2327 hrs. one male entered and is a known drug addict. On Feb. 2, 1973 during the hours of 1535 to 1600 I observed (5) five males enter and exit all at different times. Also one female did enter and proceed to the rear apt. knock and enter, (2) two minutes later she exited. This female is an addict from Feb. 1, 1973. On Feb. 1, 1973 one male was arrested at 2335 hrs. and stated after being advised of his rights that one, JD "ONE EYE JOHN" did sell him a quantity of heroin and did show him one 38 Cal. revolver and one sawed off shotgun. Through the officers investigation it was learned that JD ONE EYE JOHN is in fact one known to this department under B #824576 one John Brown and is wanted under warrant #12715, Supreme Court Docket #7257/72.

Observation of said premises indicates that drug users and sellers are frequenting as is premises. I have been a police officer for the past seven years, I have given testimony with respect to narcotic cases and I am of the opinion that said premise if [sic] being used to process narcotics. It is requested that this warrant be endorsed in accordance with "NO KNOCK" provisions, because of the easily disposable nature of the contraband, the deponent further states that through his investigation one known as John Brown has possession and control of aforementioned

> apt. and that the drugs were sold and possed [sic] in said apt. He further states that the .38 Cal. revolver was in his possession while in the apt.

After reviewing Cannon's affidavit, Judge Coffinas asked the Police Officer about the underlying charge upon which the warrant mentioned in the affidavit was predicated. Cannon explained that the charge was for narcotics and he exhibited a copy of appellant's criminal record which verified Cannon's answer (H. 9, 12).

Judge Coffinas authorized the search of appellant's apartment and a search warrant was issued for the following items: narcotics, a .38 calibre handgun and a sawed-off shotgun. Items listed on the search inventory compiled by Officer Cannon included marijuana, 25 functional syringes and a sawed-off shotgun (Hearing Exhibit 1).

The Trial

The trial of appellant Brown began on October 23, 1973, before Judge Dooling, sitting without a jury. Police Officer Cannon described the surveillance of Brown's apartment at 560 Osborn Avenue. Cannon explained that he and his brother officers had observed Brown enter the apartment on two or three occasions prior to February 1, 1973. Cannon recalled that Brown gained admission to the apartment by the use of a door key (T. 48).

Late on the evening of February 1, 1973, at about eleven o'clock, the surveillance team observed Jerry Johnson enter 560 Osborn Avenue and proceed directly to Brown's ground floor, rear apartment where he knocked on the door. Brown answered and they spoke briefly in the doorway. Johnson then left and was arrested approximately two blocks away by Officer Cannon and his partner (T. 69).

Based in part on information supplied to the arresting officers by Johnson, a search warrant was authorized for

Brown's apartment. On February 8, 1973, Cannon and several other police officers executed the warrant. After a forced entry, Cannon placed appellant Brown under arrest on the outstanding bench warrant, administered the the *Miranda* warnings, advised Brown that he had a search warrant and asked Brown for the shotgun.* Brown replied, "What shotgun?" Cannon then said, "I don't want anybody to get hurt. Tell me where the shotgun is. I have a search warrant. I am going to find it if it's here anyway." Brown then directed the arresting officers to an adjoining bedroom where the shotgun was found and seized (T. 52-55).

Later that same evening, appellant Brown explained to the arresting officers that the apartment at 560 Osborn Avenue belonged to his girlfriend who was away at the time. Brown admitted that he had been living there, paying the rent, but he insisted that the shotgun belonged to a "friend" for whom he was holding it (T. 59-61).

The informant, Jerry Johnson, also testified at trial. He stated that he had been to Brown's apartment on several occasions and that during one such visit, he observed a sawed-off shotgun in the living room. When he asked Brown whose gun it was, Brown replied that it was his, explaining that he had been robbed and he did not intend to let it happen again (T. 27-28). Johnson described the gun as having a sawed-off barrell and stock, taped and with a white string at the end of the stock. This description matched the weapon seized by Cannon during the search of Brown's apartment.

Johnson also testified that after his arrest on February 1, 1973, he reached an understanding with the police that if he helped them, they would "let him off" (T. 36). Of course, Johnson did help by furnishing the information which lead to the arrest of Brown and the seizure of the

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* Five other persons were present in Brown's apartment at the time of his arrrest. They were also arrested and charged with loitering for the purpose of using drugs.

shotgun and narcotics paraphenalia. Johnson further stated that he had been sentenced to six months probation on his charge.*

Appellant Brown neither testified nor offered any evidence in his own defense. On October 25, 1973, Judge Dooling found appellant guilty as charged.**

ARGUMENT

The affidavit of Police Officer Cannon established probable cause for the search.

Appellant's sole argument on appeal is that the affidavit of Police Officer Cannon did not establish probable cause to justify the issuance of the warrant to search appellant's apartment. In pursuing this argument, appellant quite properly insists that Cannon's affidavit does not pass the two-pronged test ennunciated in *Aguilar* v. *Texas*, 378 U.S. 108 (1964). Indeed, Police Officer Cannon could not demonstrate that the informant had any history of reliability. Appellant erroneously continues his argument, however, by asserting that the remaining allegations in Cannon's self-styled affidavit do not provide sufficient corroboration of the informant Johnson's tip to permit a finding of probable cause. *Spinelli* v. *United States*, 393 U.S. 410 (1969); see also *United States* v. *Canieso*, 470 F.2d 1224, 1231 (2d Cir. 1972).

In this connection, a recent observation of Chief Judge Friendly should be noted:

> When a tip not meeting the *Aguilar* test has generated police investigation and this has developed

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* The balance of the Government's evidence showed the shotgun was operable and that it was not registered to Brown in the National Firearms Registration and Transfer Record (T. 90-95, 96). The Government also proved an unbroken chain of custody of the weapon from the point of seizure to trial (T. 123, 141-44, 146-47, 156).

** Judge Dooling's written findings are found in Appellant's Appendix D.

> significant corroboration or other *"probative indications of criminal activity* along the lines suggested by the informant," . . . the tip, even though not qualifying under *Aguilar,* may be used to give such additional color as is needed to elevate the information acquired by police observation above the floor required for probable cause.

United States v. *Canieso,* 470 F.2d at 1231 (emphasis in original) (citations omitted). Of course, in this case, the investigation of Police Officer Cannon preceded the arrest of Johnson and the resulting information concerning Brown's activities. The crucial fact remains, however, that the investigation of Cannon and his fellow officers did provide substantial corroboration of Johnson's tip and, equally important, it developed "probative indications of criminal activity *along the lines suggested by the informant* [Johnson]. *Id.* (emphasis supplied).

During the two day surveillance of Brown's apartment, Officer Cannon observed a total of ten people, some known to be addicts, enter Brown's apartment late in the evening remain for a very short time and leave. The officers' immediate suspicions over this hardly "innocent-seeming activity" (*Spinelli, supra*) were of course confirmed by the arrest of the informant, Jerry Johnson, who admitted purchasing heroin from Brown and advised the arresting officers about the .38 calibre revolver and the shotgun.

With respect to Johnson's admissions to the officers, appellant argues that they should not be afforded any weight since they were essentially not statements against Johnson's penal interest. In an apparent attempt to distinguish *United States* v. *Harris,* 403 U.S. 573 (1971), appellant cites the understanding between Johnson and the

arresting officers to exchange his cooperation for leniency.* It is argued that because of this understanding, Johnson's admissions were purely self-serving and not against his penal interest and, therefore, were highly suspect and of no value in determining the existence of probable cause. This rather novel logic need not now be challenged since the *Harris* Court has already disposed of the argument:

> Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of a crime, like admissions against proprietory interests, carrying their own indicia of credibility—sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a "break" does not eliminate the residual risk and opprobrium of having admitted criminal conduct.

United States v. *Harris,* 403 U.S. at 583-84.

The affidavit of Police Officer Cannon also indicated that Brown's activities of February 1 and 2, 1973, were not his first venture into the world of crime. Cannon's affidavit recited that the officer's investigation revealed that Brown had previously been arrested under "B #824576" and that a supreme court warrant for his arrest was then outstanding.**

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* Johnson's understanding was first mentioned by the informant during his testimony at trial. At that time, he advised Judge Dooling that he had been sentenced to six months probation on his state charge.

** Admittedly Cannon's affidavit did not contain the added fact that this charge also involved narcotics. Judge Coffinas inquired about the outstanding charge before authorizing the warrant and he was so advised. See *United States* v. *Follette,* 379 F.2d 846 (2d Cir. 1967).

Finally, appellant charges that several of the allegations in Officer Cannon's affidavit are speculative or conclusory. For example, the District Court's conclusion that the informant Johnson was one of the men seen entering appellant Brown's apartment is dismissed as purely speculative. Appellant also complains that the affidavit does not expressly state that Johnson's purchase of heroin and his viewing of the shotgun and revolver took place in appellant's apartment at 560 Osborn Avenue. While Cannon's affidavit would unfortunately not qualify "as an entry in an essay contest," *Spinelli* v. *United States*, 393 U.S. at 438 (dissenting opinion), appellant's argument is belied by any sensible and realistic reading of Cannon's affidavit. Cannon's "conclusion" that "the drugs were sold and possed [sic] in said apart." and that "the .38 Cal. revolver was in his possession while in the apat.," was obviously based on the information supplied by the informant Johnson.

The necessity of reviewing affidavits for warrants in a realistic manner has, of course, long been recognized. In *United States* v. *Ventresca*, 380 U.S. 102 (1965), the Supreme Court observed:

> [A]ffidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.

Police Officer Cannon did submit his evidence to Judge Coffinas who concluded that probable cause did exist to justify the search. Judge Judd and Judge Dooling agreed that the warrant did establish probable cause. Their conclusions should not now be disturbed.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

June 3, 1974

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AFFIDAVIT O

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN
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day of June 1974----------, I deposite

U.S. Courthouse, Cadman Plaza East, Borou

State of New York, a two copies of

of which the annexed is a true copy, contained

directed to the person hereinafter named, at

William J.
---------The Legal
Federal De
---------606 U.S.
Foley Squa
---------New York,

Sworn to before me this
5th day of June 1974

Irene B Cohen

IRENE B. COHEN
Notary Public, State of New York
No. 24-0[illegible]
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

OF MAILING

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the brief for the appellee

in a securely enclosed postpaid wrapper

the place and address stated below:

. Gallagher, Esq.
Aid Society
efender Services Unit
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are
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Deborah J. Amundsen

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